No. 12563

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

MOULTON & POWELL AND J. K. CHEADLE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeals from the United States District Court for the Eastern District of Washington

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BRIEF FOR APPELLEES AND CROSS APPELLANTS

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Kennewick, Washington

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Attorneys for Appellees and Cross-Appellants

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 1

Statement of the Case 3

Cross-Appellants' Specification of Errors 11

Summary of Argument 12

Appellees' Argument in Answer to Appellant's Brief 13

I The District Court had jurisdiction to entertain the petition for payment of attorneys' fee. 13

II From the fund in the District Court, $422,252.80 paid into court in satisfaction of the condemnation judgment against the Government and in favor of the Priest Rapids Irrigation District, a withdrawal can be made for compensating the District's attorneys for their services in the condemnation proceeding — the District approving and consenting to the withdrawal. 25

Cross-Appellants' Argument on Cross-Appeal 37

I Withdrawal from the fund and payment of attorneys' fee should have been ordered in accordance with the contingent fee contract, as approved and consented to by the District 37

II Alternatively, the District Court should have allowed $78,918.85 as attorneys' fee, upon the basis of reasonable value of services, without regard to any contract, but giving consideration to the necessarily contingent character of compensation. 48

Conclusion 53

Appendix "A" 54

Appendix "B" 62

TABLE OF CITATIONS

Cases: *Page*

Aetna Life Ins. Co. v. Carrillo, 164 F. 2d 883.....26

Alameda County v. United States, 124 F. 2d 611....38

Albert v. Munter, 136 Wash. 164.....38

Beasley v. Assets Conservation Co., 131 Wash. 439 43

Beck v. Boucher, 114 Wash. 574.....38

Berman v. Palmetto Apartments Corporation, 153 F. 2d 192.....24

Connett v. City of Jerseyville, 125 F. 2d 121.....19

Continental Casualty Co. v. Kelly, 106 F. 2d 841..20

Hanson v. Kittitas Reclamation District, 75 Wash. 297 44

Hardman v. Brown, 153 Wash. 85.....38

In Re Barceloux, 74 F. 2d 289.....34, 51, 52

In Re Levinson, 19 F. 2d 253.....51

Jackson v. Irving Trust Co., 311 U. S. 494.....18

Jones v. Brush, 143 F. 2d 733.....13

Long v. Pierce County, 22 Wash. 330.....45, 46

Masterson v. Lennox Realty Co., 127 Conn. 35.....34

Mercantile-Commerce B. & T. v. S. E. Arkansas L. District, 106 F. 2nd 966.....49

Moore Bros. Const. Co. v. City of St. Louis, 159 F. 2d 586.....20

Muellhaupt v. Joseph A. Strowbridge Estate Co., 140 Ore. 484 34

National Refining Co. v. United States, 160 F. 2d 951.....21

O. F. Nelson & Co. v. United States, 169 F. 2d 833 .....17, 18, 19

TABLE OF CITATIONS—(Continued)

Cases: *Page*

O'Hara v. Oakland County, et al., 136 F. 2d 152.....20, 23, 24

Pickrel, Shaeffer & Eberling v. Merior, 66 N. E. 2d 273.....34

Reed v. Gormley, 47 Wash. 355.....39, 43

Shanley, et al. v. Bowers, 81 F. 2d 13.....26

Spellman v. Bankers' Trust Co., 6 F. 2d 799.....37

Stofferan v. Depew, 79 Wash. 170.....46

State ex rel. Hunt v. Okanogan County, 153 Wash. 399 .....39, 43

State ex rel. Thorp v. Devin, 26 Wn. 2d 333.....43

Sundstrom v. Sundstrom, 15 Wn. 2d 103.....22, 23

United States of America v. Clements P. Alberts, et al. and Priest Rapids Irr. Dist., No. 128-99 in the United States District Court, Eastern District of Washington..... 1

United States of America v. Priest Rapids Irrigation District, 137 Wash. Dec. 583 29, 30, 31, 35, 36, 37, 42, 48, 52

United States v. Anglin & Stevenson, 145 F. 2d 622.....52

United States v. Certain Lands, Etc., 71 F. Supp. 76 21

United States v. Certain Lands in T. of Highlands, 49 F. Supp. 962.....22

United States v. Priest Rapids Irr. Dist., 175 F. 2d 524.....2, 4, 5, 16, 17, 27, 34, 35, 49

United States v. 52.11 Acres of Land, Etc., 73 F. Supp. 820 20

Watson v. Johnson, 174 Wash. 12.....32, 33, 34

Statutes: *Page*

Act of August 18, 1890, 26 Stat. 316..... 1

Act of July 2, 1917, 40 Stat. 241..... 1

Act of April 11, 1918, 40 Stat. 518,
50 U. S. C. sec. 171..... 1

Act of March 27, 1942, 56 Stat. 176,
50 U. S. C. sec. 171(a)..... 1

28 U. S. C., sec. 1291..... 3

31 U. S. C. A. 203.....21

Rem. Rev. Stat. sec. 7428.....41

Rem. Rev. Stat. sec. 7431.....41

BRIEF FOR APPELLEES AND CROSS APPELLANTS

OPINIONS BELOW

The district court did not write an opinion. Two oral opinions of Judge Driver appear at R. 310-313 and R. 320-322.

JURISDICTION

The pending appeal and cross appeal were taken from an order signed and entered by Judge Driver on March 10, 1950 (R. 32-33), in the cause which in the district court is entitled *United States of America, Petitioner v. Clements P. Alberts, et al., and Priest Rapids Irrigation District, a municipal corporation of the state of Washington, Defendants,* No. 128-99 (R. 2). That is a condemnation proceeding in which the Government on February 23, 1943 invoked the jurisdiction of the district court under the Act of August 18, 1890 (26 Stat. 316), as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. sec 171) and section 201 of the Act of March 27, 1942 (56 Stat. 176, 177, 50 U.S.C. sec. 171 (a)). (R. 11704, page 2, 7) — [As provided by order of this Court in this appeal (R. 330-331), the three volume printed record in an earlier appeal (No. 11,704) in the same proceeding is a portion of the transcript of record in this appeal, and references in this brief to the record in the earlier appeal are

as follows: "R. 11704, page ....." References to the record printed in connection with this appeal are as follows: "R. ....."]

From the judgment on verdict in that condemnation proceeding (R. 11704, pages 1147-1158, 1161-1163), the Government in 1947 appealed and the Priest Rapids Irrigation District cross appealed; and this Court in 1949 disposed of those appeals by its decision in *United States v. Priest Rapids Irr. Dist.,* 175 F. 2d 524.

The district Court's jurisdiction of the matter involved in the pending appeal and cross appeal is the ancillary or incidental jurisdiction which the district court has by reason of its jurisdiction invoked and exercised in the federal condemnation proceeding, and by reason of the proceeds of the condemnation award being in the district court.

The jurisdiction of the district court also appears in the judgment which this Court affirmed (175 F. 2d 524, 533) with a modification. The modified judgment (R. 9-19) was entered by Judge Driver on November 21, 1949. Both the judgment on verdict (R. 11704, page 1163) which was previously reviewed by this Court and the modified judgment (R. 18) provided that the condemnation judgment be paid into the district court and "remain subject to the orders of this [United States District] Court" until such time as the district court should order payment to the Superior Court

of the State of Washington in and for Benton County for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said state court.

On March 10, 1950, when Judge Driver entered the order directing withdrawal of $55,000 from the deposit of $422,252.80 for the benefit of the Priest Rapids Irrigation District, for the payment of attorney fees (R. 33) notice of this appeal was filed (R. 34). Later, on March 30, 1950 notice of cross-appeal was filed (R. 37).

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1291.

STATEMENT OF THE CASE

This is the one brief of appellees and cross appellants, the appeal and cross appeal having been consolidated for briefing purposes by stipulation filed in this Court.

The Government's "statement" (App. Br. 2-11) is controverted as being incomplete and largely irrelevant.

The Government having questioned in its brief (App. Br. 15-16) the jurisdiction of the district court, this statement first refers to matters of record which bear on the jurisdictional question.

In 1949 this Court decided an appeal and cross appeal in the federal condemnation proceeding,

United States v. Priest Rapids Irr. Dist., 175 F. 2d 524. The record in that case shows that the district court's March 7, 1947 judgment on verdict (R. 11704, pages 1147-1158, 1161-1163) contained a paragraph (R. 11704, page 1163) which provided as follows:

> "It Is Further Ordered, Adjudged and Decreed that the judgment, and the whole thereof, *shall be paid into this court and remain subject to the orders of this Court* until such time as this Court shall order the payment of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and" (Italics added)

The provisions of that paragraph were not attacked by the Government's statement of points on appeal (R. 11704, page 1169), nor by the Government's specification of errors, contained in its brief submitted to this Court in that earlier appeal.

In that earlier appeal, the majority opinion of this Court did take note of the provisions of that paragraph. In *United States v. Priest Rapids Irr. Dist.,* 175 F. (2d) 524, 528, footnote 9, this Court stated:

> "Entirely aside from the question of the validity of the compensation award, we think that the court did not err by directing in its judgment that the amount of the award should be paid into the lower court *there to remain subject to the orders of the court* until such time

> as the court should order payment of the same to the Superior Court of the State of Washington for Benton County, for the use and benefit of the District in liquidation proceedings 'to be maintained' in said Superior Court. (See reference in this opinion to provision in Washington laws relating to 'Disorganization' proceedings.) By directing that payment of the award to be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court under applicable state law in the so-called 'Disorganization' proceedings pending in the State court. (See Horse Heaven case, supra.) The rights of all parties are preserved under this procedure." (Italics added)

In deciding that earlier appeal and cross appeal, this Court concluded that the record did not sustain the attack on the Schwellenbach formula (175 F. (2d) 524, 531). This Court concluded further (175 F. (2d) 524, 532-533) that Judge Driver had followed and applied the Schwellenbach formula except as to the application of the $170,500 payment made by the Government, the three concluding paragraphs of the majority opinion reading as follows:

> "We are convinced that the final judgment must be modified if it is to conform to the basic theory on which this case was tried. In this conclusion we have due regard for the interpretation of the Schwellenbach formula as expressed in the various trial rulings of both judges below. (See text of Judge Schwellenbach ruling immediately preceding footnote 10.)

> "For the reasons above stated the lower court was in error in failing to provide in the judgment that the $170,500 paid by the Government should be applied as a credit against the award of $473,356. Judgment against the Government for $302,856 should have been entered.
>
> "The case is remanded with directions to the lower court to modify the judgment in accordance with the foregoing views."

Neither the Government nor the Priest Rapids Irrigation District petitioned this Court for a rehearing. Neither the Government nor the District sought to have this Court's decision reviewed by the Supreme Court of the United States. And in due course the mandate of this Court was received by the district court which entered the modified judgment on November 21, 1949 (R. 9-19).

The two pertinent paragraphs of the modified judgment (R. 18) read as follows:

> "It Is Further Ordered, Adjudged and Decreed that *the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation,* and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment for the difference between $473,356.00 and $170,500.00, which judgment shall bear interest at the rate of 6% per annum on $473,356.00 from October 1, 1943, until May 12, 1944, and at the rate of 6% per annum on $302,856.00 from May 12, 1944, until paid, and

> "It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of $302,856.00, together with interest as above ordered, and the whole thereof, *shall be paid into this Court and remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington,* in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and" (Italics added)

The Government did not contend, by a new appeal or writ of mandamus or any other method, that the modified judgment failed to conform to the mandate of this Court. The modified judgment became final. The deficiency judgment, including interest, in the sum of $422,252.80 was paid into court (R. 32).

On the same date that the modified judgment was entered, November 21, 1949, two petitions were served on Government counsel and filed in the condemnation proceeding. They were the petition for payment of attorneys' fee (R. 2-8) and the petition for payment of certificates of indebtedness (R. 19-30).

Both petitions came on for hearing before Judge Driver in the condemnation proceeding (R. 67) on January 5, 1950 (R. 68). The Government made no jurisdictional objection or other objection to payment of the certificates of indebtedness (R. 68-72), Government counsel stating that he would

"interpose no objection whatever to an allowance from the funds in this court for the payment of those certificates of indebtedness." (R. 69) One recital in the proposed order was stricken at the Government's request (R. 72); and the order for payment of certificates of indebtedness was approved by Government counsel, and entered by Judge Driver on January 6, 1950 (R. 30-31).

At the January 5 and 6, 1950 hearings on the petition for payment of attorneys' fee, there was considerable evidence adduced—exhibits, testimony and stipulated evidence (R. 73-246, 264-266) in support of the petition for payment of the contract fee of $78,918.85, which the Priest Rapids Irrigation District's board of directors had approved and consented to by resolution (R. 79-80).

The district court, prior to the hearing, had indicated in a conference in chambers that, regarding the petition for payment of attorneys' fee, it might be well to have supporting testimony (R. 126).

Two witnesses for the Government testified as to reasonable compensation (R. 247-263).

The Government never filed any pleading responsive to the petition. Points and authorities in support of the petition were filed on January 5, 1950 (R. 39-64). As the record shows, a day or two before the hearing Government counsel received the supporting points and authorities, and on the

same date Government counsel mailed out the Government's points and authorities (R. 315). A statement by the court shows that both the supporting and objecting points and authorities were received and read by the court (R. 266-267).

Judge Driver's oral decision on January 6, 1950 (R. 310-313) to allow a fee of $50,000.00 was made upon a basis substantially in accordance with Government counsel's concluding concession and submission to the court (R. 309). Government counsel stated:

> "I submit to the court that these petitioners are entitled to a reasonable attorney fee, that these contracts should be completely disregarded, and this court should fix what constitutes reasonable compensation to these petitioners for their services on behalf of the District in this case."

The court gave permission for adducing further evidence on the basis adopted by the court "what would be a fair and reasonable fee in the absence of contract." (R. 315) In granting that permission, the court reserved the right to go up or down from $50,000, in the event the matter were reopened (R. 315).

On February 27, 1950, the matter was reopened, as the court stated, "for the purpose of supplementing the record by the offer of additional proof as to the reasonable value of the services of the attorneys under the theory that the court adopted."

(R. 317) The additional evidence was stipulated (R. 317-319).

The Government's contention (App. Br. 15-16) that the district court did not have jurisdiction to entertain the petition for payment of attorneys' fee developed after the January 5 and 6 hearing and decision. Indication of that contention first appeared of record on February 27, 1950. Even then, the indication was not given by Government counsel, but by one of appellees, Mr. Powell, who mentioned to the court what he had learned in a discussion in Washington, D. C. with attorneys of the Department of Justice—that they felt there was no jurisdiction in the court to entertain a petition of this kind (R. 319).

The court (R. 320-322), upon the basis of the additional evidence, and aside from consideration of the Government's indicated intention to appeal, fixed the amount of $55,000 as the amount to be withdrawn for payment of attorneys' fee—unless the Government agreed to withdrawal of $50,000 within ten days.

On March 10, 1950 the court signed the order (R. 32-33) for withdrawal of $55,000. When the order was presented, Government counsel stated (R. 323) that "the government would like the record to show that the government objects to the allowance of attorneys' fees in this case in the sum of $55,000, or any other sum." At the same time the Government filed notice of appeal and obtained an

order staying the proceeding (R. 323-324, 34-37).

Later, on March 30, 1950, notice of cross-appeal was filed (R. 37).

CROSS-APPELLANTS' SPECIFICATION OF ERRORS

The district court erred:

1. In ruling that payment of the attorneys' fee should not be made in accordance with the petition and with the resolution of the Priest Rapids Irrigation District's board of directors approving and consenting to payment of the contract attorneys' fee in the amount of $78,918.85 from the $422,252.80 paid into the district court in satisfaction of the condemnation judgment in favor of said District.

2. In failing to conclude, upon consideration of all relevant matters, that $78,918.85 is appropriate and reasonable compensation for the services in this condemnation action which have been performed by the attorneys for the Priest Rapids Irrigation District on what was necessarily a contingent basis.

3. In failing to order that $78,918.85 be withdrawn from the District's fund of $422,252.80 for the benefit of the Priest Rapids Irrigation District, for payment of attorneys' fee to cross-appellants.

SUMMARY OF ARGUMENT

Appellees' Argument in Answer to Appellant's Brief

I The District Court had jurisdiction to entertain the petition for attorneys' fee.

II From the fund in the District Court, $422,252.80 paid into court in satisfaction of the condemnation judgment against the Government and in favor of the Priest Rapids Irrigation District, a withdrawal can be made for compensating the District's attorneys for their services in the condemnation proceeding—the District approving and consenting to the withdrawal.

Cross-Appellants' Argument on Cross-Appeal

I Withdrawal from the fund and payment of attorneys' fee should have been ordered in accordance with the contingent fee contract, as approved and consented to by the District.

II Alternatively, the District Court should have allowed $78,918.85 as attorneys' fee, upon the basis of reasonable value of services, without regard to any contract, but giving consideration to the necessarily contingent character of compensation.

APPELLEES' ARGUMENT IN ANSWER TO APPELLANT'S BRIEF

I

The District Court had jurisdiction to entertain the petition for payment of attorneys' fee.

Appellees recognize that a question of the district court's jurisdiction, whether properly raised or not, must be decided by this Court. *Jones v. Brush,* 9 Cir., 143 F. 2d 733, 734. Appellees also recognize that this Court on its own volition may raise and decide a jurisdictional question, and that when considered, a jurisdictional question receives first consideration. — Accordingly, the jurisdictional question raised in the second part of appellant's brief (App. Br. 15-16) is answered first in this brief of appellees and cross-appellants.

Appellees submit that the district court's jurisdiction of this matter now on appeal(and of similar matters) was adjudicated by the judgment on verdict (R. 11704, pages 1147-1158, 1161-1163) and the modified judgment (R. 9-19), and that the Government can not now question that jurisdiction.

Appellees further submit that this matter now on appeal is within the scope of the well established ancillary or incidental jurisdiction of the district courts of the United States.

The judgment on verdict adjudged "that the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation * * *." (R. 11704, page 1157). The judgment on verdict further provided (R. 11704, page 1163):

> "It Is Further Ordered, Adjudged and Decreed that the judgment, and the whole thereof, shall be paid into this court *and remain subject to the orders of this Court* until such time as this Court shall order the payment of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and" (Italics added)

The above quoted paragraph of the judgment on verdict did not escape the Government's attention in March 1947, when the judgment was entered. Quite the contrary. That paragraph had the Government's particular attention. Originally that paragraph of the judgment (R. 11704, page 1157) provided:

> "It Is Further Ordered, Adjudged and Decreed that said deficiency judgment, and the whole thereof, shall be paid into the Superior Court of the State of Washington, in and for Benton County, to be distributed in liquidation proceedings in said Court for dissolution of the

> Priest Rapids Irrigation District, and that pending determination by said Superior Court as to the parties entitled to receive the funds comprising said judgment with interest, the proceeds of said judgment shall be held in this Court subject to payments therefrom for purposes of meeting the expenses of said Priest Rapids Irrigation District in this condemnation action and in said dissolution proceeding upon authorty for said payments by said district, approved by the Superior Court of the State of Washington in and for Benton County, and by this Court, and"

And six days after the judgment was entered (R. 11704, page 1159-1160), the Government moved to strike that particular paragraph of the judgment

> "upon the grounds and for the reason that said Paragraph improperly directs that the deficiency judgment in this proceeding be paid into the Superior Court of the State of Washington, in and for the County of Benton, instead of into the registry of this court, and further improperly provides for payments to be paid from said sum only upon the approval of said Superior Court of the State of Washington, in and for the County of Benton."

The Government insisted that the judgment against the United States provide for payment into the district court. The Government objected to the provision that payments from the fund should be approved by the state court. The Government did *not* object to the provision that payments from the fund be upon approval or order of the district court.

The Government did *not* object to the substituted paragraph (R. 11704, page 1163) which omitted any requirement that the state court approve payments from the fund while held in the federal court, and which provided that pending payment of the fund to the state court in the liquidation proceeding, the proceeds of the condemnation award should "remain subject to the orders of this [United States District] Court" alone.

The Government in its appeal from the condemnation award did not claim any error in that paragraph of the judgment on verdict. Subsequent to the decision of this Court in *United States v. Priest Rapids Irr. Dist.,* 175 F. 2d 524, the Government did not in any way question the pertinent paragraph of the modified judgment which reads as follows (R. 18):

> "It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of $302,856.00, together with interest as above ordered, and the whole thereof, shall be paid into this Court and *remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington,* in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and" (Italics added)

Obviously, that paragraph was in accordance with the mandate of this Court, for this Court had stated

in its majority opinion (175 F. 2d 524, 528, footnote 9):

> "Entirely aside from the question of the validity of the compensation award, *we think that the court did not err by directing in its judgment that the amount of the award should be paid into the lower court there to remain subject to the orders of the court until such time as the court should order payment of the same to the Superior Court of the State of Washington* for Benton County, for the use and benefit of the District in liquidation proceedings 'to be maintained' in said Superior Court. (See reference in this opinion to provision in Washington laws relating to 'Disorganization' proceedings.) By directing that payment of the award to be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court under applicable state law in the so-called 'Disorganization' proceedings pending in the State court. (See Horse Heaven case, supra.) The rights of all parties are preserved under this procedure." (Italics added)

This Court's decision in *O. F. Nelson & Co. v. United States,* 169 F. 2d 833, is authority for the following statements. When a court renders judgment it tacitly asserts, if it does not do so expressly, that it has jurisdiction to render the judgment. Whether a particular issue, such as jurisdiction, was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. The tacit or express adjudication in a judg-

ment, that the court has jurisdiction to render the judgment, may be questioned directly by appeal. But it can not be attacked collaterally. Res judicata applies to jurisdiction, even though the jurisdictional point was not raised or pressed in connection with the earlier judgment. — The foregoing statements in this paragraph are paraphrased (almost quoted verbatim) from this Court's opinion in *O. F. Nelson & Co. v. United States, supra.* In that opinion, this Court referred to and quoted from a number of precedents, including *Jackson v. Irving Trust Co.,* 311 U. S. 494, 61 S. Ct. 326, 85 L. Ed. 297.

The Government in its 1947 appeal to this Court, or in a petition to the Supreme Court for writ of certiorari, could have questioned whether the district court had jurisdiction to include in the judgment on verdict the provision that, pending payment to the state court in the liquidation proceeding, the proceeds of the condemnation award would be held in the federal district court "subject to the orders of this [United States District] court." The Government did not then attack that jurisdiction directly. The Government can not now attack that jurisdiction. On that jurisdictional matter, the modified judgment (R. 9-19) of November 21, 1949 is conclusive.

The district court must be deemed to have decided the jurisdictional question in the main condemnation proceeding, in which the district court provided in its judgment that the fund would be

subject to the orders of the court. And that jurisdictional question can not be attacked collaterally in this ancilliary proceeding. *Connett v. City of Jerseyville,* 7 Cir., 125 F. 2d 121, 125.

Appropos the Government's contention in the pending appeal that the district court had no authority to retain the fund subject to the orders of the district court—appellees quote what this Court stated in rejecting the Government's untimely jurisdictional contention in *O. F. Nelson & Co. v. United States,* 169 F. 2d 833, 834:

> "It is not necessary for us to resolve this dispute, even assuming that the United States is correct in its long delayed contention."

However, the Government is wrong on the merits of its long delayed jurisdictional contention.

The district court had ancillary or incidental jurisdiction to entertain the petition for payment, which was approved and consented to by the Priest Rapids Irrigation District's board of directors. (R. 79-80) The district court had jurisdiction of the condemnation proceeding instituted by the United States (R. 11704, page 2). The judgment of $422,-252.80 against the United States and in favor of the District was paid into the district court, and the fund is still there (R. 32). The fact that the fund is in the district court gives rise to that court's ancillary or supplemental jurisdiction.

Where a federal court, in the exercise of its jurisdiction in a principal case, has money or property in the custody of the court, it may entertain a petition for payment of attorneys' fee in the exercise of ancillary or supplemental jurisdiction. *Moore Bros. Const. Co. v. City of St. Louis,* 7 Cir., 159 F. 2d 586, 588; *O'Hara v. Oakland County, et al.,* 6 Cir., 136 F. 2d 152, 155; *Continental Casualty Co. v. Kelly,* Dist. Col. 106 F. 2d 841, 843.

The parties invoking the ancillary jurisdiction of the federal district courts in condemnation cases do not have to have had an interest in the condemned property, as the Government at least inferentially argues (App. Br. 16).

In fact, the United States itself, through its Collector of Internal Revenue, has invoked the ancillary jurisdiction of federal district courts in condemnation cases, in which the Collector of Internal Revenue had no interest in the condemned property.

In *United States v.* 52.11 *Acres of Land, Etc.,* D. C., E. D., Mo., 73 F. Supp. 820, 823, the condemnation award included approximately $4000 representing indebtedness of the landowners to one McDowell. A creditor of McDowell obtained a judgment against him in state court and started garnishment proceedings against the landowners. Subse-

quently a federal Collector of Internal Revenue assessed taxes against McDowell, but served notices of liens, etc. on the landowners after commencement of the garnishment proceedings. In the condemnation proceeding, the creditor and the United States (Collector of Internal Revenue) contested their respective claims to the money on deposit in the federal court to the credit of McDowell. The court held that the creditor's claim was senior in point of time and the court ordered the funds paid to the creditor. — In *United States v. Certain Lands, Etc.,* D. C., E. D., Mo., 71 F. Supp. 76, there was a comparable situation in another condemnation case, in which the same person, McDowell, had assigned his portion of the condemnation award to his attorney as security for payment for services. The attorney's rights as assignee of McDowell were held to be superior to those of the Collector of Internal Revenue of the United States. — In still another "McDowell" case, *National Refining Co. v. United States,* 8 Cir., 160 F. 2d 951, 954, 955, still another assignee of McDowell prevailed over the United States' Collector of Internal Revenue, the appellate court reversing the district court. Incidentally, it may be noted that the court of appeals there held that the assignment by McDowell did not involve any violation of 31 U.S.C.A. 203, the statute regarding assignments of claims against the United States.

In the "McDowell" cases, *supra,* the United States' Collector of Internal Revenue was not a party to the condemnation actions, nor were McDowell's creditor, his attorney or his other creditor assignee. — Nor was the village of Highlands, N. Y., which took an assignment of a condemnation award from an owner of condemned lands in payment of taxes on *other* land which was not condemned, and collected from the condemnation award. *United States v. Certain Lands in T. of Highlands, N. Y.,* D. C., S. D., N. Y., 49 F. Supp. 962, 965. — They did not have to be parties to the condemnation actions, or have interests in the condemned properties, in order to invoke the ancillary or incidental jurisdiction of the district courts relating to the moneys paid into those courts in satisfaction of condemnation judgments.

Incidentally, the appellees and cross appellants undoubtedly became equitable assignees of $78,-918.85 of the $422,252.80 paid into the district court in favor of the Priest Rapids Irrigation District, in view of the contingent fee contract (R. 76-78) coupled with the November 21, 1949 resolution of the District's board of directors approving and consenting to payment of the contract fee from the fund in the district court (R. 79-80). — The attendant facts and circumstances shown in the record more clearly show an equitable assignment than did the facts and circumstances in *Sundstrom v. Sundstrom,* 15 Wn. 2d 103, 108, 129 P. 2d 783, in

which the state court found an equitable assignment under its announced rule that:

> "What amounts to a present appropriation constituting an equitable assignment is thus a question to be gathered from a consideration of the language used, in the light of all the attendant facts and circumstances."

However, the jurisdiction of the district court to entertain the petition did not depend upon the District's attorneys having an equitable assignment. Nor did it depend upon whether those attorneys petitioned directly or through the District.

In *O'Hara v. Oakland County, et al.,* 6 Cir., 136 F. 2d 152, the main case involved the validity of drainage bonds, which were held to be invalid. In the course of the proceeding drainage assessments in the sum of $133,000 accumulated and came into the custody of the federal district court. The attorney, whose services were principally responsible for obtaining the decree of invalidity petitioned for payment of attorney fee. An allowance by a master of a $30,000 fee from the $133,000 was made. However, the district court dismissed the petition for payment of attorney fee because the court thought it had no authority to compensate the attorney out of the fund. The appellate court reversed the dismissal and directed that the fee be paid. In the course of its opinion the court said (136 F. 2d 152, 155):

> "The allowance does not depend upon whether petitioner's client, Oakland Hills, and Oakland County were aligned in interest upon the same or opposite sides of the litigation, or upon whether petitioner's application was made by him directly to the court or through his client, or whether the litigation was by classes or otherwise; or in what particular manner the fund was created. These were all mere formalities. See Sprague v. Ticonic Bank, supra, (307 U. S. at page 167; Colley v. Wolcott, 8 Cir., 187 F. 595)."

Berman v. Palmetto Apartments Corporation, 6 Cir., 153 F. 2d 192, 194 is to the same effect.

It is clear from the record on this appeal and from the authorities cited that: (1) The district court's jurisdiction to entertain the petition was conclusively adjudicated in the condemnation judgment which provides that the fund shall "remain subject to the orders of this [United States District] Court", and the Government can not now question that jurisdiction. (2) In any event, the district court, having jurisdiction of the main condemnation proceeding and having custody of the $422,252.80 paid in satisfaction of the judgment in favor of the Priest Rapids Irrigation District, had ancillary or supplemental jurisdiction to entertain the petition and enter the order from which the Government appealed.

II

From the fund in the District Court, $422,252.80 paid into court in satisfaction of the condemnation judgment against the Government and in favor of the Priest Rapids Irrigation District, a withdrawal can be made for compensating the District's attorneys for their services in the condemnation proceeding—the District approving and consenting to the withdrawal.

In the first part of appellant's brief (App. Br. 11-15), the Government contends that no withdrawal from the $422,252.80 fund in the district court can be made for the purpose of compensating the Priest Rapids Irrigation District's attorneys for their services in the condemnation litigation which resulted in the judgment in favor of the District.

However, in the district court, Government counsel concluded presentation of the Government's position with the following concession and submission (R. 309):

> "I submit to the court that these petitioners are entitled to a reasonable attorney fee, that these contracts should be completely disregarded, and this court should fix what constitutes reasonable compensation to these petitioners for their services on behalf of the District in this case."

And the district court decided the matter substantially in accordance with that concession and submission (R. 310-313).

Appellees submit that it is too late for the Government to disaffirm that concession now. *Shanley, et al. v. Bowers,* 2 Cir., 81 F. 2d 13, 15-16; *Aetna Life Ins. Co. v. Carrillo,* 5 Cir. 164 F. 2d 883, 884.

Incidentally, it is worth noting that in the district court the Government likewise conceded that there should be an allowance from the fund for payment of certificates of indebtedness which had been issued by the District to meet "necessary expenses of the District, exclusive of attorney fees, in the defense of said condemnation action, * * *." (R. 24, 19-31, 68-72) Regarding payment of those certificates of indebtedness, Government counsel stated to the district court (R. 69): "I think I shall interpose no objection whatever to an allowance from the funds in this court for the payment of those certificates of indebtedness."

If the Government in this Court is permitted to disaffirm its concession made in the district court, the Government's appellate contention (App. Br. 11-15) should be rejected on the merits.

The Priest Rapids Irrigation District is "the only person having an interest in and to the compensation" amounting to $422,252.80. It was so adjudicated in the judgment on verdict (R. 11704, page 1157) which this Court affirmed, except for

a modification in the amount of the judgment, *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524, 533. The modified judgment (R. 9-19) provides as follows (R. 18):

> "It Is Further Ordered, Adjudged and Decreed that *the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation, and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment* for the difference between $473,356.00 and $170,500.00, which judgment shall bear interest at the rate of 6% per annum on $473,-356.00 from October 1, 1943, until May 12, 1944, and at the rate of 6% per annum on $302,856.00 from May 12, 1944, until paid, and" (Italics added)

The italicized part of the above quoted paragraph is identical with the comparable paragraph of the judgment on verdict (R. 11705, page 1157), which this Court affirmed, with a modification in the amount of the judgment.

The District, "the only person having an interest in and to the compensation" fund of $422,252.80, approved and consented (R. 79-80) to payment from the fund of the contingent contract fee, $78,918.85. Regarding the petition for payment of that contract fee, Judge Driver stated (R. 267):

> "the thing that primarily concerns me are the objections raised by the Government. In the absence of those objections I should be inclined to grant the petition, of course."

The Government's appeal and argument (App. Br. 11-15) presents no basis for reversing Judge Driver's order which was made upon consideration of the Government's objections (R. 310-313).

Moreover, the Government as the condemnor of the District's non-irrigation properties had no standing to raise any objection. It would be anomalous if a condemnor which had been subjected to a deficiency judgment, including interest, of $422,252.80 could be heard to contend that the defendant's attorneys, with the defendant's approval and consent, could not be paid any attorney fee from the $422,252.80 paid into court in satisfaction of the judgment.

It is further submitted that the Government, as a claimant to either all or some of the assets of the Priest Rapids Irrigation District in State court liquidation proceedings, could not properly object in the district court to a withdrawal from the fund for compensating the District's attorneys for their services in the condemnation proceeding.

For reasons and authorities hereinafter set forth, the Government's appellate argument (App. Br. 11-15) would be untenable—even if the Washington Supreme Court had upheld the Government's con-

tention that the Government, as a matter of state law, is entitled to the net assets of the Priest Rapids Irrigaion District.—*However, on December 14, 1950 the Washington supreme court in an en banc decision rejected the Government's contention. United States of America v. Priest Rapids Irrigation District,* 137 Wash. Dec. 583, 225 P. 2d 202. For the convenience of this Court the opinion in that case is printed as an appendix of this brief (Appendix A, pp. 54-62, *infra*).

On the issue, "Is the United States entitled to the net assets of the District on its dissolution?", the court ruled against the Government, stating, "We have no hesitancy in determining that issue contrary to the contention of the United States." 137 Wash. Dec. 583, 587, 588, 225 P. 2d 202, 205.[1]

In January and February, 1950, in fixing $55,000 as the amount of attorneys' fee to be allowed the District's attorneys from the fund in the federal district court, Judge Driver took into consideration the possibility that in the then pending State court

[1] The Government in its brief (App. Br. 9, Footnote 5) refers to that state court case and states "the decision is being awaited."—As the records and files of the Clerk of this Court, re C.A. 9, No. 12563, show, the Department of Justice with its letter of December 21, 1950 to the Clerk of this Court enclosed page proof of the Government's brief. Appellees on December 14, 1950 telegraphed to the Department of Justice advising of the state court decision, stating that a copy of the opinion was being air mailed to the Department of Justice and stating that in connection with the Government's brief and pending appeal the Government "may want to consider state decision. If so we agreeable to 10 days' or two weeks' extension time to file your brief." And on December 15 appellees wrote to the Clerk of this Court enclosing copy of said telegram.—It is regrettable that the December 14, 1950 decision of the Washington supreme court is not referred to in the Government's brief.

action commenced by the Government (R. 163-173) against the District and its officials: "It may very well be that the Government will be paid back under the In Re Horse Heaven case, the doctrine in that case, that the money will be returned to the Government" (R. 310-311).—Judge Driver allowed $55,000 as the amount to be withdrawn from the fund for payment of the District's attorneys in the condemnation proceedings, upon consideration of the Government's contention that as a matter of State law it had the exclusive right to the net assets of the Priest Rapids Irrigation District. Judge Driver made that determination prior to May 2, 1950 when the superior court for Benton County dismissed the Government's State court action, with prejudice, in a judgment in which the superior court judge held that the Government "has no interest whatever in the assets of the Priest Rapids Irrigation District * * *," 137 Wash. Dec. 583, 587, 225 P. 2d 202, 205. A certified copy of the superior court's May 2, 1950 decree and order of dismissal has been placed in the hands of the Clerk of this Court. For the convenience of this Court, that decree and order of dismissal is printed as an appendix of this brief (Appendix B, pp. 62-71, *infra*). Judge Driver's decision in the fee matter was likewise before the December 14, 1950 en banc decision of the Washington supreme court which affirmed the superior court's judgment of dismissal, modified to read that the Government "has no

exclusive interest in the assets of the Priest Rapids Irrigation District * * *'' 137 Wash. Dec. 583, 589, 225 P. 2d 202, 206. The Washington supreme court carefully refrained from passing on the question

> ''even by inference, as to whether, when an owner of land in the district acquired an interest in its non-irrigation properties on the *de facto* dissolution of the district [probably February 23, 1943; certainly not later than April 1, 1943], and thereafter sold and conveyed his land to the United States, he thereby transferred his interest in the non-irrigation properties to the United States.
>
> ''If both such former owner and the United States come into court claiming a portion of the net assets on the basis of that interest, the court would, in the dissolution proceeding, determine whether the owner had transferred that interest to the United States or had retained it.
>
> ''The superior court may well be right in that portion of the judgment appealed from wherein it adjudged and decreed 'that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District,' but it seems to us that the court went beyond the determination of the issue properly before it at the time the order of dismissal was entered, that issue being whether the United States was entitled to *all* the net assets of the district available for distribution.'' (137 Wash. Dec. 583, 588, 225 P. 2d 202, 206.)

Since Judge Driver ordered a withdrawal of $55,000 for payment of the District's attorneys for their services in the condemnation action, upon

consideration of the then pending and undetermined contention by the Government in the State court that the Goverment was entitled to all of the assets of the Priest Rapids Irrigation District, it is obvious that the Government's contention (App Br. 11-15) has been completely undermined by the subsequent decisions of the state courts.

It should be noted that the Government does not contend on this appeal that the amount of the attorneys' fee fixed by Judge Driver is too high. The Government's contention on this appeal is limited to the contention that no withdrawal whatever from the fund for payment of the District's attorneys could be made.

However, even, if the Government had been right instead of wrong in its contention that it was entitled to all of the net assets of the Priest Rapids Irrigation District—Judge Driver's order from which the Government appeals still would not be reversible on the Government's appeal. Even in that assumed situation, as regards the Government's contention that no allowance whatever for attorneys' fee was permissible, Judge Driver's order providing for withdrawal from the fund in federal court for payment of attorneys' fee would have been at least within "the sound discretion of the court, in view of all the circumstances." *Watson v.*

Johnson, 174 Wash. 12, 16, 24 P. 2d 592, 89 A.L.R. 1527.

In that case de facto directors of a savings and loan association *unsuccessfully* resisted the state director of efficiency in a proceeding brought by him for appointment of a receiver and for an involuntary liquidation of the association. The superior court allowed attorneys' fees and costs of the de facto directors, against the assets in the hands of the receiver. There were cross-appeals to the state supreme court. That court affirmed the principle of allowing attorneys' fees and costs against the assets in the hands of the receiver, and the court also increased the allowance for attorneys' fees. The court stated (174 Wash., at page 16):

> "The principle upon which an allowance is made is that counsel fees and costs of the litigation are in the nature of expenses incurred by the corporation and its directors in the protection and preservation of the trust which they represent; and even if it turns out that a case is made for interference by the appointment of a receiver and the dissolution of the corporation, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and the fund involved in the litigation to the expenses incurred in discharging a general duty cast upon the corporation and its directors to take all reasonable means for its protection. *People v. Commercial Alliance Life Insurance Co.,* 148 N. Y. 563, 42 N. E. 1044; *Goodyear Tire & Rubber Co. v. United Motor*

Car & Supply Co., 89 N. J. Eq. 108, 103 Atl. 471; *Wolbrette v. New Orleans Drug Co.,* 149 La. 434, 89 South. 406; *Louque v. Hercules Oil Co.,* 170 La. 355, 127 South. 866."

The Washington case of *Watson v. Johnson, supra,* has been followed in *Masterson v. Lennox Realty Co.,* 127 Conn. 35, 15 A. 2d 15, 16 and *Pickrel, Shaeffer & Eberling v. Merior,* 66 N. E. 2d 273, 276, 278 (Ohio). *Muellhaupt v. Joseph A. Strowbridge Estate Co.,* 140 Ore. 484, 14 P. 2d 282, is to the same effect.

The position of the de facto directors of the Priest Rapids Irrigation District and its attorneys is much stronger than the position of the de facto directors and attorneys involved in the Washington case of *Watson v. Johnson, supra.* In the condemnation proceeding, *United States v. Priest Rapids Irr. Dist.,* 175 F. 2d 524, the District's de facto directors and attorneys did more than defend against the United States "in good faith and upon reasonable grounds." They did that, and they defended *successfully.* — The proof of that pudding is the judgment against the United States and in favor of the District, the $422,252.80 paid into the district court in satisfaction of that judgment. — The cases cited by the Government (App. Br. 14) are not in point. More in point is this Court's decision in *In Re Barceloux,* 74 F. 2d 289, 293, affirming the district court's allowance of a $25,000 attorney fee for services in recovering $125,-

000 for a bankruptcy estate which otherwise had less than $1000 of assets.

The Government states (App. Br. 12) that the District's de facto directors "were not obliged" to defend the condemnation action. — In view of the results obtained in that condemnation action, it is obvious that if the District's directors had not defended, the good faith and grounds of their decision not to defend would have been questionable.

Much of the Government's brief (App. Br. 2-11, 11-15) amounts to reargument of the Government's position in the condemnation action which this Court decided in *United States v. Priest Rapids Irr. Dist.,* 175 F. 2d 524. If the Government were unhappy about being required to pay just compensation for the District's non-irrigation properties in accordance with the Schwellenbach formula, the Government could have sought review of this Court's decision by the Supreme Court of the United States. The Government did not do so. This Court's decision and the district court's modified judgment (R. 9-19) became final and conclusive.

Furthermore, the Government's contention regarding state law, which the Government urged upon this Court in the earlier appeal and which the Government reiterates in its argument on this appeal, was rejected on December 14, 1950 by the Washington supreme court. *United States v. Priest*

Rapids Irrigation District, 137 Wash. Dec. 583, 225 P. 2d 202.

The Government, if it so chooses, may go into the proper state court dissolution proceeding and claim some portions of the District's net assets, claiming to be transferee of those landowners who sold and conveyed their privately owned land to the Government. Whether a sale and conveyance of land within the District by a private land owner, after de facto dissolution of the District, transferred the land owner's interest in the District's non-irrigation properties is an open question in the Washington supreme court which expressly refrained from passing upon that question "even by inference." But as the state supreme court said, "The superior court may well be right in that portion of the judgment appealed from wherein it adjudged and decreed 'that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District' * * *." (137 Wash. Dec. 583, 588, 589, 225 P. 2d 202, 206)

The fund in the district court is there *"subject to the orders of this* [*United States District*] *Court"* until such time as that court pays the fund in to the state court for the use and benefit of the District in the state court dissolution proceeding.

The District's de facto directors and attorneys are "those whose efforts made possible the existence of the net assets which are available for distribution, despite the strenuous opposition of the United States." (137 Wash. Dec. 583, 588, 225 P. 2d 202, 205)

It was from that fund of $422,252.80, the existence of which is due to the efforts of the District's directors and attorneys, that Judge Driver—with approval and consent of the District's directors—ordered a withdrawal for the purpose of compensating those legal services.

A withdrawal from that fund for that purpose obviously was proper.

The Government's appeal is without merit.

CROSS-APPELLANTS' ARGUMENT ON CROSS-APPEAL

I

Withdrawal from the fund and payment of attorneys' fee should have been ordered in accordance with the contingent fee contract, as approved and consented to by the District.

The contingent fee contract (R. 76-78) having been made in the State of Washington, the validity of the contract and the rights of the contracting attorneys are to be determined under the contract law of Washington. *Spellman v. Bankers' Trust Co.,* 2 Cir., 6 F. 2d 799, 800. The power and au-

thority of the Priest Rapids Irrigation District to enter into the contingent fee contract is a matter of state law; and pertinent state decisions are authoritative. *Alameda County v. United States,* 9 Cir., 124 F. 2d 611, 616, 617.

Contingent fee contracts, such as that between the District and its attorneys, are valid in the State of Washington. *Hardman v. Brown,* 153 Wash. 85, 87, 92, 279 Pac. 91, recognized a 50% contingent fee contract as permissible under the laws of Washington; and in that case the contingent fee amounted to about $62,500, the value of the property recovered apparently being approximately $125,000. — The contingent fee contract involved in this appeal (R. 76-78) calls for a fee of $78,918.85 from the $422,252.80 paid in satisfaction of the judgment in favor of the District. That fee amounts to about 19% of the fund in court, first reduced by the District's expenses in the litigation. The computation of the fee and its payment from the fund in court were approved and consented to by resolution of the District's board of directors (R. 79-80).

Earlier Washington cases have upheld contingent fee contracts. *Beck v. Boucher,* 114 Wash. 574, 195 Pac. 996; *Albert v. Munter,* 136 Wash. 164, 176. 239 Pac. 210.

Municipal corporations of the State of Washington have power and authority to make contingent

fee contracts. In *Reed v. Gormley,* 47 Wash. 355, 91 Pac. 1093, the court upheld the authority of the county commissioners of King County to employ counsel to prosecute suits to secure escheats, the compensation to be 50% of the value of the estates counsel procured to be escheated. In *State ex rel. Hunt v. Okanogan County,* 153 Wash. 399, 423, 280 Pac. 31, the court upheld a 50% contingent fee contract made by Okanogan County with Hunt for services in support of the county's equitable and moral claim against the United States. Satisfaction of the claim in the sum of $77,435.31 was obtained; and the state supreme court directed that the county be compelled to pay Hunt his fee of $38,717.65. The court's opinion, regarding the contingent fee contract with the municipal corporation of Okanogan County, stated (153 Wash., at p. 423):

> "We are of the opinion that the employment of relator and his predecessor by the county commissioners was within their statutory powers. We do not concern ourselves in this case with the question of the wisdom of the making of the employment contract here in question. Indeed, we are not asked by counsel on either side to do so. We are only deciding that the commissioners had the power to make the contract, and that, it being faithfully and effectually performed and the county having reaped the benefit thereof, relator is entitled to compensation according to the terms of the contract."

In deciding to disregard the "19%" contingent fee contract between the District and its attorneys, Judge Driver stated (R. 313):

> "If I had before me a contingent contract of this kind between a live and functioning municipal corporation and attorneys on some claim that the District had, I would not hesitate to say that this is a fair and reasonable contract. I think it is, but under the circumstances of this case, where the District had gone out of business, where the funds are being brought in as trust funds for the benefit of beneficiaries and the beneficiaries may very well be the government in this case, I think that the court should be somewhat conservative, perhaps, if I may put it that way, in the matter of the allowance of fees, and I think that even in these times of inflation $50,000 is a good fee in a lawsuit."

It is submitted that Judge Driver erred in so deciding. The reasons which support and justify contingent fee contracts are greater in the case of a municipal corporation which has been put out of business and which has practically no funds except such as may be recovered in litigation—than in the case of a "live and functioning municipal corporation" which generally could engage attorneys upon the basis of certain rather than contingent compensation. In fact, in the case of a municipal corporation which has been put out of business and which has practically no funds except such as may be recovered in litigation, the reasons which support and justify contingent fee contracts are compelling.

The power and authority of a municipal corporation, in the situation of the Priest Rapids Irrigation District, to make a binding contingent fee contract should not be whittled down in view of the situation. The pertinent statute law and court decisions of the State of Washington do not lend support to a whittling down of such power and authority. Instead, they lend support to a strengthening of that power and authority.

Remington's Revised Statutes, Section 7428, regarding an irrigation district's board of directors, provides that:

> "The board shall have the power, and it shall be its duty, * * * to make and execute all necessary contracts, * * * and generally to perform all such acts as shall be necessary to fully carry out the provisions of this chapter, * * *."

Remington's Revised Statutes, Section 7431, authorizes and empowers the board of directors:

> "to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this chapter, or to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by this chapter, or acquired in pursuance thereof; and in all courts, actions, suits, or proceedings, the said board may sue, appeal, and defend, in person or by attorney, and in the name of such irrigation district."

In cause No. 8035 in the superior court for Benton County, the court on August 1, 1946 decreed (R.

104-107) that B. Salvini and J. H. Evett are de-facto directors of the District, and the court's decree provided (R. 106) that until further order or decree of that court, as provided for later in the decree, B. Salvini and J. H. Evett:

> "shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests of said district."

Regarding the August 1, 1946 order or decree in the state court cause No. 8035, the December 14, 1950 opinion of the Washington supreme court states:

> "It was necessary that someone represent the district in that [condemnation] proceeding, and, on a proper showing, the superior court for Benton County, in an action commenced by a former landowner and the last elected directors of the district, which action is hereinafter referred to as cause No. 8035, made and entered an order August 1, 1946, appointing the last elected directors, B. Salvini and J. H. Evett, to function as such directors and to 'do any and all things necessary to the defense by said district' in the condemnation proceeding." (137 Wash. Dec. 583, 585, 225 P. 2d 202, 204)

In view of the pertinent irrigation laws of Washington quoted above (page 41, *supra*) and in view of the August 1, 1946 decree in the state court

proceeding—it is clear that the District's de facto directors had more definite power and authority to make the contingent fee contract with the District's attorneys, than the power and authority of the county commissioners involved in *Reed v. Gormley,* 47 Wash. 355, 91 Pac. 1093, and *State ex rel. Hunt v. Okanogan County,* 153 Wash. 399, 280 Pac. 31. — Beyond question the authority of the District's directors to make the contingent fee contract with the District's attorneys was within the object, spirit and meaning of the Washington statutes regarding irrigation districts. And the controlling canon of statutory construction is as stated (and applied) in *State ex rel. Thorp v. Devin,* 26 Wn. 2d 333, 345, 173 P. 2d 994:

> "A thing which is within the object, spirit, and meaning of a legislative act is as much within the act as if it were within the letter."

Furthermore, as the supreme court of the State said in *Beasley v. Assets Conservation Co.,* 131 Wash. 439, 443, 230 Pac. 411, in upholding the validity of a contract under which warrants were issued by an irrigation district:

> "Its (district's) powers are not only such as are granted in express words, but also those necessarily or fairly implied in or incident thereto or indispensable to its declared objects and purposes."

Moreover, the court allows irrigation districts' boards of directors to exercise wide latitude of dis-

cretionary judgment. In *Hanson v. Kittitas Reclamation District,* 75 Wash. 297, 313, 134 Pac. 1083, the court stated:

> "The board of directors are clothed by the statute with a wide discretion as to the manner in which they shall manage the business of the district, and the courts are not warranted in interfering on any mere question of good business policy. Nothing short of a gross abuse of their powers will warrant such an interference."

At the hearing before Judge Driver on January 5 and 6, 1950 Government counsel dwelt on an earlier, 1943, contract between the District and Moulton & Powell. Regarding that contract (R. 97-99) a number of pertinent and related exhibits were introduced and testimony was adduced (R. 81-122; R. 130-228). — It is clear from the evidence that the 1943 contract covered only the services rendered by Moulton & Powell to the District through October 1943 in connection with presentation of problems, involving the District owned properties, in a few selected "test" cases covering condemnation of privately owned lands within the District.

In any event, the 1943 contract was superseded by the contingent fee contract which expressly provides (R. 78): "This contract shall supersede the contract heretofore made between the District and

Moulton & Powell." — In the course of Government counsel's argument before Judge Driver (R. 267-291; R. 306-309) some contention was made that the contingent fee contract is not supported by any consideration additional to that involved in the 1943 contract. That contention is irrelevant, since the services covered by the contingent fee contract were additional to those contemplated and compensated by the 1943 contract. However, it should be noted that no express or independent consideration would have been necessary under the law of the State of Washington.

In *Long v. Pierce County,* 22 Wash. 330, 344, 348, 61 Pac. 142, the state supreme court reversed the trial court which had rejected an offer of oral evidence that county commissioners had orally modified a construction contract providing, by the modification, more favorable terms to the contractor. Regarding one of the contentions made by appellee, the court stated (22 Wash., at p. 348):

> "It is further insisted that the proffered testimony was properly rejected for the reason that no offer was made to show a consideration for the modification of the original agreement, or reciprocal advantage accruing to the county by reason thereof, and that the record contains nothing upon which a consideration can be inferred. *But no express or independent consideration was necessary.* 'The contract, when modified by subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract.'" (Italics added)

The Pierce County case, *supra,* was followed in *Stofferan v. Depew,* 79 Wash. 170, 172, 139 Pac. 1084, in which the court affirmed a judgment for plaintiff based upon a second agreement of the parties. In upholding the second agreement, the court stated (79 Wash., at p. 172):

> "Appellant first contends that the second agreement executed subsequent to the sale is void for want of consideration. It is apparent from the terms of the two agreements and the allegation of the complaint that the second agreement, as a mutual act of the parties, was made as an amendment to, or in substitution for the original. The substitution of a new contract for an old one, in itself constitutes a sufficient consideration."

Those cases are the law of the State of Washington, and it should be noted that the leading case of *Long v. Pierce County, supra,* involved a municipal corporation. — The contingent fee contract (R. 76, 78) provides that: "This contract shall supersede the contract heretofore made between the district and Moulton & Powell."

The contingent fee contract was a very reasonable arrangement; it could have provided for larger percentages of compensation and still have been reasonable. That was the opinion of three eminent members of the bar who testified, or whose testimony at the district court's suggestion was stipulated (R. 123-128). Those witnesses were V. O.

Nichoson, president of the Washington State Bar Association and formerly, for eight years, a superior court judge in Yakima County (R. 128); John Gavin, member of the Board of Governors of the Washington State Bar Association and past president of the Yakima County Bar Association (R. 128, 264); and Harold Shefelman, formerly a member of the House of Delegates of the American Bar Association, formerly president of the Seattle Bar Association, and an attorney of wide experience in representing municipal corporations (R. 123, 124).

Judge Driver stated that he thought the contingent fee contract (for about 19% of the $422,-252.80) would be "a fair and reasonable contract" if made by a "live and functioning municipal corporation" (R. 313); and he stated: "In the absence of those [the Government's] objections I should be inclined to grant the petition, of course." (R. 267)

The Government's only objections before this Court (App. Br. 11-16)—that the district court was without jurisdiction, and that no withdrawal whatever could be made from the fund for compensating the District's attorneys—are without merit (pages 13-37, *supra*). Furthermore, the Government's basic contention, upon which the Government bases its appellate objection to any withdrawal whatever, was rejected by the Washington Su-

preme Court on December 14, 1950. *United States v. Priest Rapids Irrigation District,* 137 Wash. Dec. 583, 225 P. 2d 202.

A contingent fee contract is more essential to a municipal corporation in the situation of the District, and more justifiable, than in the case of a "live and functioning municipal corporation."

The District's board of directors approved and consented to payment, from the $422,252.80 fund, of the contingent contract fee of $78,918.85—about 19% of the fund (R. 79-80).

The petition for payment of the contingent contract fee—approved and consented to by the District—should have been granted.

II

Alternatively, the district court should have allowed $78,918.85 as attorneys' fee, upon the basis of reasonable value of services, without regard to any contract, but giving consideration to the necessarily contingent character of compensation.

Cross appellants are fully aware of the many court decisions which hold that a federal appellate court generally will not disturb an allowance for attorneys' fee fixed by the district court in the exercise of its sound discretion.

However, the recent decision of the Washington supreme court in *United States of America v. Priest Rapids Irrigation District,* 137 Wash. Dec. 583, 225

P. 2d 202, on December 14, 1950 provides in this cross-appeal a special and persuasive reason for this Court reviewing Judge Driver's order of March 10, 1950 (R. 32-33).

Furthermore, the novel, unique and complex aspects of the condemnation case, *United States v. Priest Rapids Irr. Dist.,* 9 Cir., 175 F. 2d 524, are within the knowledge of this Court.

And, "appellate courts, as trial courts, are themselves experts as to the reasonableness of fees, and may, in the interest of justice, fix the fees of counsel, albeit in disagreement on the evidence with the views of the trial court." *Mercantile-Commerce B. & T. Co. v. S. E. Arkansas L. District,* 8 Cir., 106 F. 2d 966, 973.

In evidence (R. 317-319) are the opinions of three eminent members of the bar, V. O. Nichoson, John Gavin and Harold Shefelman (see page 47, *supra*). After their opinions on the reasonableness of the contingent contract were given (R. 123-128), and after the district court announced the theory it adopted (R. 310-313), their opinions were given as to the reasonable value of the services under the theory that the court adopted (R. 317-319).

V. O. Nichoson and John Gavin were of the opinion that "without regard to any contract, but giving consideration to the necessarily contingent character of compensation for the services, the reasonable value of the services rendered in this con-

demnation case by petitioning attorneys is approximately $80,000." (R. 318). Upon the same basis, Harold Shefelman was of the opinion that the reasonable value of the services is in excess of $80,000. (R. 318-319).

At the January 5-6, 1950 hearing in Yakima, as a rebuttal witness, John Gavin testified regarding contingent fee contracts in Yakima County (R. 264-266). The Yakima County Bar Association's printed fee schedule provides for a contingent fee of 33-1/3 per cent of the recovery in trial court litigation; and that provision applies to all litigation handled upon a basis of contingent compensation (R. 264-265). In the event of appeal of a case tried upon a contingent fee basis, the custom in the Yakima County bar is to increase the 33-1/3% to 40%.

The $78,918.85 fee which cross-appellants seek is about 19% of the $422,252.80 fund, first deducting from the fund the District's expenses (R. 79-80). — Even if the contingent fee contract made by the District and its attorneys is not given contractual effect, nevertheless that contract (R. 76-78) and the District board's resolution of November 19, 1949 (R. 79-80) are evidence that the District's directors consider $78,918.85 to be the reasonable value of the services.

In ruling on the matter on January 6, 1950, Judge Driver stated (R. 312):

> "I need hardly say that the litigation is unusually difficult, involved questions that were not only novel, but perhaps unique, and that the case was very capably conducted and successfully prosecuted both in the trial court and the appellate court."

Because of the novel and perhaps unique aspects of the condemnation case in which cross-appellants rendered their services, reference to decide cases involving allowance of attorney fees is not particularly helpful in this cross-appeal. However, several of the decided cases have some bearing on this cross-appeal.

In the case of *In re Levinson,* D. C., W. D. Wash., 19 F. 2d 253, 256, attorney fees in the sum of $42,500 were allowed, approximately 25% of the amount recovered. Judge Neterer stated (19 F. 2d, at p. 256):

> "This is a very unusual case. At the inception of this estate there was no fund for the payment of the attorneys. The fees for their services necessarily were contingent, * * * and should be fairly compensated."

In the case of *In re Barceloux,* 9 Cir., 74 F. 2d 288, 293, attorneys for the trustee in bankruptcy recovered $125,000 for the estate which otherwise had less than $1000 of assets. The attorneys were allowed $25,000 in fees, 20% of the recovery. This Court stated in its opinion (74 F. 2d, at page 293):

> "In the instant case, there was no contract for a contingent fee or for any fee. The attorneys

> for the trustee petitioned for the reasonable value of services rendered. In such a case the fees allowed, to be reasonable, must take into consideration that the attorneys rendered services, compensation for which was inherently contingent, for, unless a recovery were had, there would be no funds in the estate from which remuneration could be made for the effort put forth."

In *United States v. Anglin & Stevenson,* 10 Cir., 145 F. 2d 622, cert. den. 324 U. S. 844, the court affirmed the allowance of a 25% fee from the $1,235,724.72 estate of the Indian, Jackson Barnett. The allowance by the district court and the affirmance by the appellate court were strenuously opposed by the United States, the Secretary of the Interior being guardian of the trust funds inherited by the successful heirs.

In view of the necessarily contingent character of compensation for cross-appellants' services, and in view of their successful handling of the unusual condemnation case which involved novel and unique questions, an allowance of $78,918.85 as the reasonable value of cross-appellants' services should have been made by the district court. That attorneys' fee, about 19% of the $422,252.80 fund, is particularly justifiable in view of the Washington supreme court's decision in *United States v. Priest Rapids Irrigation District,* 137 Wash. Dec. 583, 225 P. 2d 202. That decision of December 14, 1950 rejects the Government's basic contention; and it was consideration of that contention which led Judge

Driver in January 1950 to be "somewhat conservative" (R. 313) in determining the reasonable value of services.

CONCLUSION

For the foregoing reasons the Government's appeal should be held to be without merit. And on the cross-appeal, upon the basis of the contingent fee contract or upon the basis of reasonable value of services, the order appealed from should be reversed with direction that the district court enter an order allowing cross-appellants an attorney fee of $78,918.85 from the $422,252.80 fund in the district court.

Respectfully submitted,

MOULTON & POWELL
Kennewick, Washington

and

J. K. CHEADLE
Spokane, Washington

January 1951

APPENDIX A

[137 Wash. Dec. 583, 225 P. 2d 202]
[No. 31547. *En Banc.* December 14, 1950.]

In the Matter of the Dissolution of PRIEST RAPIDS IRRIGATION DISTRICT.

THE UNITED STATES OF AMERICA, *Appellant, v.* PRIEST RAPIDS IRRIGATION DISTRICT *et al., Respondents.*[1]

[1] United States—Eminent Domain—War—Compensation for Property Taken Under War Powers—Distribution of Assets of Irrigation District.

Appeal from a judgment of the superior court for Benton county, MacIver, J., entered May 2, 1950, dismissing an action for the dissolution and distribution of the assets of an irrigation district. Affirmed.

Bernard H. Ramsey and *Hart Snyder* (*A. Devitt Vanech* and *John F. Cotter* of counsel), for appellant.

Moulton, Powell & Gess and *J. K. Cheadle,* for respondents.

The Attorney General and *E. P. Donnelly, Assistant, amicus curiae.*

HILL, J.—The question before us is whether the United States, having by condemnation, and by purchase subsequent to the commencement of condemnation proceedings, acquired all the lands within the Priest Rapids Irrigation District, hereinafter called the district, is entitled to the net assets of the district, when those assets consist of moneys paid the district for its non-irrigation properties.

The district owned and operated a pumping plant, canals and other irrigation properties, together with a power plant and transmission lines used in part for the generation and transmission of power for the pumping of water for irrigation purposes and

in part for the generation and transmission of additional power for commercial purposes.

February 23, 1943, the United States commenced an action under the second war powers act to condemn about 194,000 acres (for the Hanford atomic engineering project) by perimeter description, including all of the lands within the district (15,950.39 acres). On the same date, the United States obtained an order granting to it the right to immediate possession of all the property described, for military purposes. April 1, 1943, the United States took actual physical possession of the district's pumping plant, main canal and related irrigation properties, which made it impossible for the district to continue to provide irrigation water service for the lands within its boundaries, the purpose for which it had been organized and operated. October 1, 1943, the United States took actual possession of the power properties of the district.

It is these power properties that are responsible for the present litigation. As the condemnation proceedings came on to trial for the purpose of determining the amounts which the various landowners within the district were entitled to receive as compensation for their property, their interest in the valuable and profitable commercial power-producing properties of the district became a subject of controversy. To eliminate the necessity of proving, in each individual condemnation case, the value of those properties and the condemnee's proportionate share therein, with the probability of varying values being fixed by different juries, the able and distinguished judge of the United States district court before whom the cases were tried, the late Lewis Baxter Schwellenbach, devised what is referred to throughout the litigation as the "Schwellenbach formula" for the solution of the unusual and difficult problem presented. The formula involved an allocation of the value of the properties of the dis-

trict between those used for irrigation and those used for non-irrigation (commercial power) purposes.

It was Judge Schwellenbach's position (affirmed by the ninth circuit court of appeals, *United States v. Priest Rapids Irr. Dist.,* 175 F. (2d) 524) that, when the United States acquired and paid for all the lands within the district, it also acquired and paid for all the irrigation properties of the district (they of necessity being considered in determining the value of the land), but that it did not pay for the non-irrigation (commercial power) properties belonging to the district. Speaking of the non-irrigation assets, Judge Schwellenbach said:

" 'The fact is that, in the first case which was tried, the landowner attempted to assert his claim to his proportionate share in the District's assets, the petitioner [Government] objected and I ruled against the landowner. The basis of this ruling was that in the trial for the purpose of determining the compensation to be paid for a separate tract, there was no room to try out also the value of that landowner's proportionate share of the District assets. He was not the owner of the legal title to the District assets. He had no right to assert a direct claim to his proportionate share. Furthermore, as a matter of procedure, if I had permitted each landowner to assert his claim in each separate trial, it would have resulted in chaos and interminable delay as a consequence of which this [these] cases never would have been completed . . . it would have resulted in an absurd situation because the landowner in one case would have a jury fixing one value upon the District's assets and then the jury in the next case might place an entirely different value upon the District's assets. The awkwardness and the confusion which would have resulted was realized by counsel on both sides and dozens of cases have been tried since with the understand-

ing that, at some time, the question of the right of the landowners to their proportionate share of the value of the District assets would be thrashed out.' " (As quoted in *United States v. Priest Rapids Irr. Dist., supra.*)

At Judge Schwellenbach's insistence, the United States instituted a proceeding to determine the amount it should pay for the non-irrigation (commercial power) properties of the district. It was necessary that someone represent the district in that proceeding, and, on a proper showing, the superior court for Benton county, in an action commenced by a former landowner and the last elected directors of the district, which action is hereinafter referred to as cause No. 8035, made and entered an order August 1, 1946, appointing the last elected directors, B. Salvini and J. H. Evett, to function as such directors and to "do any and all things necessary to the defense by said district" in the condemnation proceeding. The *de facto* directors, through their counsel, made an effective presentation of the district's case, with the result that the United States was required to pay $473,356 for the non-irrigation (commercial power) properties. After payment of the bonded indebtedness of the district, there remained $302,856, together with interest, for distribution on the dissolution of the district. It must be remembered, when reference is made herein to the net assets of the district available for distribution, that there are no assets available for distribution except this portion of the amount paid for the non-irrigation (commercial power) properties.

The distinction between the irrigation and non-irrigation properties of the district having been established by Judge Schwellenbach and affirmed in *United States v. Priest Rapids Irr. Dist., supra,* two basic problems were left for solution by the courts of this state: (1) How was the district to

be dissolved or disorganized? and (2) Who was entitled to share in the net assets of the district?

The United States, conceiving that as owner of all the land in the district it was entitled to the entire amount available for distribution, filed an action in the Benton county superior court November 15, 1949, which action is hereinafter referred to as cause No. 9913, alleging that the statutes of the state of Washington make no provision for the dissolution of an irrigation district under the circumstances existing in this case, and that the United States would sustain a substantial pecuniary loss and irreparable damage if the district was not dissolved. It invoked the equity power of the court to appoint a receiver for the purpose of dissolving the district, paying all lawful claims, and distributing the net assets to the United States.

Thereafter, November 25, 1949, in cause No. 8035, a petition was filed by Salvini and Evett, the *de facto* directors who had maintained and established the right of the district to the award for its non-irrigation (commercial power) properties, alleging that the statutory proceedings for the dissolution of irrigation districts were not applicable to the present situation; and asking that the court decree that said district was in effect or *de facto* dissolved on or about February 23, 1943, and not later than April 1, 1943, and that the court administer the trust estate of the district and distribute it to the persons equitably entitled to share in it; and asking, further, that Salvini, Evett and R. S. Reierson be appointed as liquidating trustees, and that the court adjudge that those entitled to share in the assets of the district available for distribution are those persons who, by reason of their interest in lands located within the boundaries of the irrigation district, were members of the group which was really interested in the success of the district and had to meet the burden of said district prior to the

disruptive action taken by the United States in pursuance of its war powers.

The superior court for Benton county entered an order fixing December 12, 1949, as the date of the hearing on the petition, and directing that notice be published and be served upon the United States and the state of Washington. The date of hearing was thereafter continued to February 20, 1950.

By agreement, cause No. 9913 and cause No. 8035 came on simultaneously for hearing before the superior court for Benton county, February 20, 1950.

All litigants were agreed that none of the four statutory methods for the dissolution of irrigation districts (Rem. Rev. Stat., §§ 7526 to 7530, 7531 to 7543, 7543-1 to 7543-33 [P.P.C. §§ 679-421 to -525]; Rem. Rev. Stat. (Sup.) §§ 7527-1 to 7527-3 [P.P.C. §§ 679-431 to -435]) were applicable to the existing circumstances.

All litigants asked that the Benton county superior court proceed under its inherent equity power to dissolve the district and distribute its net assets to those entitled to receive them. They were in marked disagreement as to who should control the liquidation (under the direction of the court) and as to who should receive the net assets.

The trial court's order in cause No. 9913 reads in part:

"Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the United States of America, plaintiff [appellant] herein, has no interest whatever in the assets of the Priest Rapids Irrigation District and has no basis for seeking distribution to the United States of the net assets of the Disrict or for seeking the ancillary or incidental relief of appointment of a receiver; and accord-

ingly, the plaintiff's complaint and petition for dissolution be and it hereby is dismissed with prejudice."

The United States appeals from that order.

Actually, the issue presented by the order appealed from is very narrow: Is the United States entitled to the net assets of the district on its dissolution? If so, there is merit in the government's contention that it should, in effect, control the liquidation and have the right to keep expenses at a minimum; if not, it has no right to control the liquidation, and there is no basis for its attempt to take the liquidation out of the hands of those whose efforts made possible the existence of the net assets which are available for distribution, despite the strenuous opposition of the United States.

[1] We have no hesitancy in determining that issue contrary to the contention of the United States. We base our holding that the United States has no exclusive right to the net assets of the district on three propositions:

(1) When the United States, in the exercise of its war powers, made it impossible for the district to carry out the purposes for which it had been organized, the district was dissolved *de facto* as of that date (probably February 23, 1943; certainly not later than April 1, 1943).

(2) The owners of the lands within the district at the time of the *de facto* dissolution (at least the owners of lands on which all assessments had been paid) had, as a result of that ownership, an interest in the non-irrigation (commercial power) properties of the district.

(3) The United did not acquire that interest in the non-irrigation properties from any landowner whose property it acquired solely through the condemnation procedure, as the extent and value

of that interest was expressly excluded from the consideration of the jury when determining what such landowners were to be paid.

Not having acquired the interest in the non-irrigation properties of those landowners in the district whose property it acquired solely through the condemnation procedure, the United States did not have an exclusive right to the net assets of the district on its dissolution, and it had no basis for complaint when the superior court for Benton county dismissed cause No. 9913 and elected to proceed to dissolve the district and distribute its net assets in cause No. 8035.

Nothing further is needed to justify an affirmance of the judgment of dismissal in cause No. 9913.

We do not pass upon the question, even by inference, as to whether, when an owner of land in the district acquired an interest in its non-irrigation properties on the *de facto* dissolution of the district, and thereafter sold and conveyed his land to the United States, he thereby transferred his interest in the non-irrigation properties to the United States. If both such former owner and the United States come into court claiming a portion of the net assets on the basis of that interest, the court would, in the dissolution proceeding, determine whether the owner had transferred that interest to the United States or had retained it.

The superior court may well be right in that portion of the judgment appealed from wherein it adjudged and decreed "that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District," but it seems to us that the court went beyond the determination of the issue properly before it at the time the order of dismissal was entered, that issued being whether the United States was entitled to *all* the net assets of the district available

for distribution. The portion of the judgment of the superior court quoted on p. 587 hereof will be modified to read:

"Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the United States of America, plaintiff herein, has no *exclusive* interest . . . in the assets of the Priest Rapids Irrigation District and has no basis for seeking distribution to the United States of *all* the net assets of the District or for seeking the ancillary or incidental relief of appointment of a receiver; and accordingly, the plaintiff's complaint and petition for dissolution be and it hereby is dismissed with prejudice." (Additions indicated by italics, deletion by series of periods.)

As modified, the judgment of dismissal of cause No. 9913 is affirmed. Respondents will recover their costs on this appeal.

Beals, Robinson, Mallery, Schwellenbach, Grady, Hamley, and Donworth, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

In and for Benton County

In the Matter of the Dissolution of Priest Rapids Irrigation District, a Corporation,
United States of America,
Plaintiff,

vs.

Priest Rapids Irrigation District, a Corporation, and
B. Salvini, J. H. Evett and R. S. Reierson,
Defendants.
No. 9913

DECREE AND ORDER OF DISMISSAL

The above entitled cause, in due and regular course and at the request of plaintiff, having come on for trial on the merits on February 20, 1950 before the Honorable Ian MacIver, Judge of the above entitled Court, the plaintiff appearing and being represented by Hart Snyder, Special Attorney, Department of Justice, and the defendant appearing and being represented by their attorneys, Charles L. Powell and J. K. Cheadle; documentary evidence and testimony having been adduced by plaintiff and by defendants on February 20, 1950; the hearing having been continued for introduction of further evidence and for argument until March 13, 1950; the parties prior to March 13, 1950 having submitted to the Court written briefs and memoranda; further evidence having been introduced on March 13, 1950 and arguments of counsel having been heard on March 13 and 14, 1950; and the Court being fully advised; and the matter of the form of this decree and order having duly come on for hearing on April 22, 1950 in Yakima, Washington by stipulated consent of the parties; and

It appearing to the Court that the Priest Rapids Irrigation District is an irrigation district which was organized and operated under the laws of the State of Washington; and that said district on February 23, 1943 owned and operated a pumping plant, canals and other irrigation properties together with a power plant and transmission line used in part for the generation and transmission of power for the pumping of water for irrigation purposes and in part for the generation and transmission of excess power for commercial purposes; and

It further appearing that on February 23, 1943 the plaintiff, the United States of America (hereinafter referred to as the "Government"), pursu-

ant to the Act of Congress approved August 18, 1890, (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918, (40 Stat. 518; 50 U.S.C. Sec. 171) and March 27, 1942, (Public Law 507—77th Congress), known as the Second War Powers Act, 1942, and the Act of Congress approved July 2, 1942. (Public Law 649—77th Congress) commenced, in the United States District Court for the Eastern District of Washington, a condemnation action entitled United States of America, petitioner vs. Clements P. Alberts, et al., defendants, No. 128, an action to condemn an area including about 194,000 acres, which area, described by perimeter description, included all of the lands within the Priest Rapids Irrigation District and also more than 150,000 acres of additional land, the condemnation being for military purposes, for establishment of the Hanford Engineering (Atomic Energy) Project; and it appearing that in said condemnation action on the same date, February 23, 1943, the Government obtained an order granting to the Government, pursuant to the applicable acts of Congress above set forth, the right of immediate possession to said area of approximately 194,000 acres; and it appearing that on April 1, 1943 the Government, pursuant to said order granting it the right of immediate possession for military purposes, took actual, physical possession of the Priest Rapids Irrigation District's pumping plant, main canal and related irrigation properties, and that said taking by the Government made it impossible for the Priest Rapids Irrigation District to continue to provide irrigation water service for the lands within its boundaries, the purpose for which it had been organized and operated; and

It further appearing that on April 22, 1943 there were filed and entered in said condemnation action an amended petition and an amended order granting the right of immediate possession, increasing

the area covered by the condemnation action of about 206,000 acres; and it appearing that pursuant to said orders of February 23, 1943 and April 22, 1943, granting to the Government the right of immediate possession for military purposes, the Government on October 1, 1943 took actual, physical possession of the power properties of the Priest Rapids Irrigation District (hereinafter referred to as the "District"); and

It further appearing that between February 23, 1943 and May 12, 1944 the Government for said military purposes took actual possession of all tracts of land within the boundaries of the District and acquired title to said tracts of land by the filing of declarations of taking in said condemnation action and by deeds with consequent dismissals in said condemnation action, and that compensation for the taking of said tracts was determined by agreement between the parties as evidenced by options and acceptances thereof or by stipulations and by jury verdicts; and

It further appearing that in said condemnation action in a proceeding regarding the properties of the District, the Federal District Court entered a judgment on verdict against the Government and in favor of the District in the sum of $473,356, together with interest, as just compensation for the taking by the Government of the so-called non-irrigation (power) properties of the District used for commercial purposes; and that said Federal District Court refused to allow a condemnation award to the District for the value of the so-called irrigation properties of the District, said award for the non-irrigation properties and refusal of an award for the irrigation properties being in accord with the so-called Schwellenbach formula established by District Judge Schwellenbach prior to the jury trial; and it appearing that District Judge Driver (who succeeded Judge Schwellenbach dur-

ing the course of the proceeding in the trial court) in entering judgment on verdict declined to credit against the jury verdict of $473,356 the $170,500 which had been deposited in court by the Government as the estimated just compensation for all of the properties of the District taken by the Government and which $170,500 had been used, pursuant to stipulations of the parties and orders of the Court, to discharge the bonded indebtedness of the District, and that District Judge Driver instead charged said $170,500 against the irrigation properties of the District for which no condemnation award had been allowed but which irrigation properties, in response to a special interrogatory, the jury had valued at $365,845; and

It further appearing that upon appeal and cross appeal to the United States Court of Appeals for the Ninth Circuit, said appellate court concluded that the judgment should have provided that the $170,500 should be applied as a credit against the condemnation award of $473,356; and it appearing that said appellate court accordingly decided that judgment against the Government for $302,856 should have been entered; and

It further appearing that said Federal appellate court was of the opinion that the Federal District Court did not err by directing in its judgment that the amount of the award should be paid into the Federal District Court there to remain subject to the orders of that Court until such time as said Federal District Court should order payment of the same to the Superior Court of the State of Washington for Benton County, for the use and benefit of the District in liquidation proceedings to be maintained in said Superior Court, the disposition of the fund to be finally decided by this State court under applicable state law in the proceedings pending in this State court; and

It further appearing that in accordance with the disposition of the case by the United States Court of Appeals, the Federal District Court on November 21, 1949, signed and entered a modified and final judgment on verdict which provided that:

"It Is Further Ordered, Adjudged and Decreed that the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation, and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment for the difference between $473,356.00 and $170,500.00, which judgment shall bear interest at the rate of 6% per annum on $473,356.00 from October 1, 1943 until May 12, 1944, and at the rate of 6% per annum on $302,856.00 from May 12, 1944, until paid, and

"It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of $302,-856.00, together with interest as above ordered, and the whole thereof, shall be paid into this Court and remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and

"It Is Further Ordered, Adjudged and Decreed that title to the hereinabove described interests in the above described properties be and the same is hereby vested in the United States of America, petitioner herein, as to the irrigation properties as of April 1, 1943, and as to the power properties as of October 1, 1943, which said title is free and clear of any

and all charges, interests, claims, taxes, liens and encumbrances of any kind or character whatsoever."

and

It further appearing that said judgment, together with interest, in the total amount of $422,252.80, in favor of the Priest Rapids Irrigation District, was paid into the registry of said Federal District Court by the Government on or about December 23, 1949; and it appearing that said Federal District Court has ordered a withdrawal from said sum for payment of certain certificates of indebtedness of the District, that said Federal District Court has ordered a withdrawal from said sum for payment of attorneys' fee to the attorneys of the District, regarding which order re attorneys' fee the Government has obtained a stay and is taking an appeal to the United States Court of Appeals for the Ninth Circuit, and that the balance of said sum remains in said Federal District Court under said modified and final judgment; and

It further appearing that the assets of the District are comprised almost entirely of the aforementioned sum in said Federal District Court, that the District has no bonded indebtedness, and that the District is not insolvent; and

It further appearing from the files and records of this Court in Wright, et al. v. Chapman, et al., No. 8035 in the above entitled Court, which files and records are in evidence in this cause No. 9913, that pursuant to an order of this Court, dated August 1, 1946, in said cause No. 8035 B. Salvini and J. H. Evett, plaintiffs in said No. 8035, on November 23, 1949, filed in said pending cause No. 8035 their petition re further proceedings; and that, although the Government had knowledge of, and an opportunity to appear and be heard at, the hearing on said petition re further proceedings in said No. 8035 as shown by the records and files

therein, the Government has not made any appearance in said cause No. 8035; and

It further appearing that in this cause No. 9913 the Government requested that this cause No. 9913 be set for trial on the merits on February 20, 1950, the same date which had previously been set for hearing on the petition re further proceedings in said cause No. 8035; and the said two causes having come on for hearing before this Court on the same date and, upon motion by defendants in No. 9913, this Court having consolidated the two causes for strictly limited purposes of a single hearing, by an order expressly providing that the order of consolidation and the single hearing would not operate to make the Government a party to said cause No. 8035 or to submit the Government to the jurisdiction of the Court in said cause No. 8035; and

It further appearing to the Court that in this cause No. 9913 the Government alleges and contends and the evidence shows that the Government acquired fee title to the properties of the District and to all lands within the boundaries of the District for use in connection with the Hanford Atomic Energy Project and that said properties and lands have been and will continue to be used by the Government exclusively for said military purposes; and it further appearing that the Government alleges and contends that the Government by reason of its ownership of said lands is the sole party interested in the assets of the District; and it appearing that the Government thereupon contends that the Government is entitled in equity to have the District dissolved, to have a receiver of the District appointed and to have the net assets of the District distributed to the Government; and

It further appearing to the Court that the tracts of lands within the boundaries of the Priest Rapids Irrigation District, whether acquired by the Govern-

ment by declarations of taking in the condemnation action, or by deeds from landowners with consequent dismissals in the condemnation action, or by other means, were acquired, owned and held, and are being held, by the Government in its sovereign capacity exclusively for the military purposes of the Hanford Atomic Energy Project, purposes other than irrigation under the irrigation district laws of the State of Washington; and it appearing that as a matter of Federal and State constitutional and statutory law the tracts of land within the boundaries of the District acquired, owned and held by the Government for said military purposes never have been while held by the Government, and are not, subject to either the primary obligation or the secondary obligation or any other obligation to the District; and it appearing that the Government as owner and holder for said military purposes of said tracts of land within the District never has paid any assessments and as a matter of Federal and State constitutional and statutory law could not be subjected to any assessment of said lands by the District; and

It further appearing that said tracts of land within the boundaries of the District, in ownership by the Government for said purposes, were and are as free from being subject to bearing the burdens of the District as though said tracts of land had been formally excluded and withdrawn from the boundaries of said District; and that, as a matter of law and equity, acquisition of said lands by the Government for said military purposes had the same effect, so far as relationship between the Government and the District is concerned, as though the lands were formally excluded from the District by the Government's acquisition for said military purposes; and

It further appearing, as a matter of law and equity of the State of Washington, that the bene-

fits of ownership of lands within an irrigation district do not accrue to and can not be realized by landowners who never have paid District assessments, who never have held their lands subject to District assessments, who never have held their lands subject to the primary and secondary obligations of lands under the irrigation district laws of the State, and who never have been members of the group which is really interested in the success of the District, those who are subject to meeting its burdens;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District and has no basis for seeking distribution to the United States of the net assets of the District or for seeking the ancillary or incidental relief of appointment of a receiver; and accordingly, the plaintiff's complaint and petition for dissolution be and it hereby is dismissed with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, the defendants in this cause No. 9913 having sought an affirmative decree in their answer and counter petition only as an alternative to their prayer that the complaint and petition for dissolution be dismissed, the dismissal with prejudice of the complaint and petition for dissolution shall be the final and complete disposition of this cause No. 9913.

Done in open court this 27th day of April, 1950.

IAN R. MACIVER
Judge of the Superior Court.

Presented by:
J. K. CHEADLE
Of Attorneys for Defendants.
Copy received and notice of presentation waived:
HART SNYDER
Of Attorneys for Plaintiff.